

The court incorporates by reference in this paragraph and adopts as the findings and orders of this court the document set forth below. This document has been entered electronically in the record of the United States Bankruptcy Court for the Northern District of Ohio.




John P. Gustafson
United States Bankruptcy Judge

Dated: September 23 2014

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|-----------------------|---|-------------------------|
| In Re: |) | Case No.: 13-35191 |
| |) | |
| Kathryn B. Westbrook, |) | Chapter 7 |
| |) | |
| Debtor. |) | Adv. Pro. No. 14-3047 |
| |) | |
| Fred L. Cousin, |) | Judge John P. Gustafson |
| |) | |
| Plaintiff, |) | |
| v. |) | |
| |) | |
| Kathryn B. Westbrook, |) | |
| |) | |
| Defendant. |) | |

ORDER FOR EVIDENTIARY HEARING

This court held a further pretrial scheduling conference on September 19, 2014, on pro se Plaintiff's Adversary Complaint to Determine the Dischargeability of Debt ("Complaint") [Doc. # 1]. Attorney for Defendant, the Defendant, and the pro se Plaintiff all appeared at the hearing in person. The court had held a previous pre-trial on this matter on June 2, 2014, which was attended by both parties and the attorney for the Defendant.

Before the court are Plaintiff's initial one page, hand written Complaint [Doc. #1], the Answer of Defendant Kathryn B. Westbrook asserting the affirmative defense of failure to state a claim [Doc. #7],

Supplement Motion Denying Defendants Bankruptcy Debt To Plaintiff [Doc. #8], Motion To Dismiss Chapter 7 Bankruptcy Filing On Ground of U.S. Code 727 - Discharge, an “Abuse” of the Bankruptcy System, Income Test and Means Test Rules [Doc. #13], (Supplemental) to the Amended Complaint and the Motion to Dismiss Debtors Chapter 7 Bankruptcy Case Filed on 12/27/13 That Is In Abuse. On Grounds of Chapter 7 Bankruptcy Rule 4006. Notice Of No Discharge and U.S. COD 727 - Discharge Rules, Plaintiff Filed on 08/01/2014. (And the “Abuse” of the Bankruptcy System. On the Income Test and Means Test Rules. That was Filed 08/01/2014. [Doc. #14], (Motion To Dismiss) Debtor’s Chapter 7 Bankruptcy Case Filed on 12/27/13. Agency of Plaintiff - Creditor on the Grounds of Chapter 7 Bankruptcy Rule 4006. Notice of No Discharge That is an (“Abuse” of the Bankruptcy System. Income Test and Means Test Rules). And U.S. COD 727 Discharge Rules. [Doc. #15], Answer [Doc. #16], Response to Motion to Dismiss filed by Debtor [Doc. #17], In Response to Debtor(s) Denying Plaintiff Motion to Dismiss Debtor(s) Debt to Plaintiff: Dated 8/12/14 [Doc. #22], Attachments Filed by Plaintiff Fred L. Cousin [Doc. #23], and (Third Supplement) From the one that was Filed on 08/05/14, to the Amended Complaint and the Motion to Dismiss Debtor(s) Chapter 7 Bankruptcy case Filed on 12/27/13. [New Evidence) in Abuse of the Bankruptcy Prevention and Consumer Protection Act of 2005. Revised as of 01/01/14. [Doc. # 28].

The underlying Chapter 7 bankruptcy case was filed on 12/27/13. Initially, the Debtor did not list the claim¹ of Fred L. Cousin.² An Amended Schedule F was filed on 4/4/14. [Doc. #11] The last day to oppose discharge or dischargeability was 4/21/14. Plaintiff’s Complaint was filed on 4/21/14. At the initial pre-trial, the Plaintiff was granted an additional 60 days to file an an Amended Complaint.

Under recent Supreme Court authority, a court must determine whether the complaint “contain[s] sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’ ” *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S.Ct. 1937, 173 L.Ed.2d 868 (2009)(quoting, *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007)). A court should construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations in the complaint as true. *Iqbal*, 556 U.S. at 679; *Erickson v. Pardus*, 551 U.S. 89, 93–94, 127 S.Ct. 2197, 167 L.Ed.2d 1081 (2007); *Twombly*, 550 U.S. at 555–56.

¹/ The law in the Sixth Circuit related to notice in a “no asset” Chapter 7 case is set forth in *In re Madaj*, 149 F.3d 467 (6th Cir. 1998) and *In re Rosinski*, 759 F.2d 539 (6th Cir. 1985). The Chapter 7 Trustee filed a “no asset” report in the Chapter 7, Case No. 13-35191. [Doc. #9].

²/ Fred L. Cousin is the father of the Debtor.

Despite this liberal pleading standard, the “tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 556 U.S. at 678; *see also*, *Twombly*, 550 U.S. at 555, 557 (“labels and conclusions” or a “formulaic recitation of the elements of a cause of action will not do,” nor will “naked assertion[s]” devoid of “further factual enhancements”); *Papasan v. Allain*, 478 U.S. 265, 286, 106 S.Ct. 2932, 92 L.Ed.2d 209 (1986)(a court is “not bound to accept as true a legal conclusion couched as a factual allegation”). The plaintiff must provide the grounds of his entitlement to relief “rather than a blanket assertion of entitlement to relief.” *Twombly*, 550 U.S. at 556 n. 3. Thus, “a court considering a motion to dismiss can choose to begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth.” *Iqbal*, 556 U.S. at 679.

When the complaint does contain well-pleaded factual allegations, “a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S. at 679. “A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 678. Though “[s]pecific facts are not necessary,” *Erickson*, 551 U.S. at 93, and though Rule 8 “does not impose a probability requirement at the pleading stage,” *Twombly*, 550 U.S. at 556, the factual allegations must be enough to raise the claimed right to relief above the speculative level and to create a reasonable expectation that discovery will reveal evidence to support the claim. *Iqbal*, 556 U.S. at 678–79; *Twombly*, 550 U.S. at 555–56. This inquiry as to plausibility is “a context specific task that requires the reviewing court to draw on its judicial experience and common sense... [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not ‘show[n]’—‘that the pleader is entitled to relief.’” *Iqbal*, 556 U.S. at 679 (quoting Fed.R.Civ.P. 8(a)(2)).

A *pro se* complaint should be liberally construed. *Boswell v. Mayer*, 169 F.3d 384, 387 (6th Cir. 1999). But the Court is not required to fabricate allegations which are not pleaded, or conversely, ignore the facts that have been pleaded. *See, Estelle v. Gamble*, 429 U.S. 97, 106, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976); *Haines v. Kerner*, 404 U.S. 519, 520, 92 S.Ct. 594, 30 L.Ed.2d 652 (1972); *McDonald v. Hall*, 610 F.2d 16, 19 (1st Cir. 1979).

With these principles in mind, the court inquired what facts the Plaintiff hoped to show to support the allegations in his Complaint, because under even the liberal construction rule, Plaintiff’s Complaint and various supplements were predominantly conclusory allegations, several of them based on rules and statutes

that do not permit, by their terms, the relief being sought.

The primary factual basis that would support allegations in Plaintiff's Complaint (as amended and supplemented) is that the Debtor is married, and not divorced as reflected in the Petition, Schedules and the Form 22A Means Test. This is important, factually, because according to the documents filed by the Debtor, she and her two children receive income only from Social Security Disability.³ If there is no other income - for example, from an undisclosed spouse - Section 707(b) is clear that dismissal for abuse is an action that cannot be brought by a creditor because the Debtor would be below the median income level for the state. *See*, Section 707(b)(6). This also appears to be the factual basis for the allegation that the Debtor made a "false oath or account" under Section 727(a)(4)(A).

Accordingly, for good cause shown,

IT IS ORDERED that the court will hold an Evidentiary Hearing on Plaintiff's Complaint on **October 20, 2014, at 1:30 p.m.** The court notes that the hearing will be on the factual issue underlying what appears to be the only viable causes of action under the Complaint, specifically Sections 727(a)(4)(A) and 707(b); and

IT IS FURTHER ORDERED that Plaintiff's Motion for signed copies, be and hereby is **DENIED**, pursuant to Fed. R. Bankr. P. 5005, Local Rule 5005-4, and for the reasons stated on the record at the hearing; and

IT IS FINALLY ORDERED that **on, or before, September 26, 2014**, Defendant shall provide to the Plaintiff a certified copy of a decree of dissolution or divorce of Defendant's marriage, if any such document(s) exists.

#

³/ Under Section 101(10A)(B), "current monthly income" "excludes benefits received under the Social Security Act".